Supreme Court, U.S.
FILED

941697 APR 17 1995

OFFICE OF THE CLERK

No. ____

In The

Supreme Court of the United States

October Term, 1994

SARA GILBREATH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR WRIT OF CERTIORARI

GARY R. GOSSETT, JR.
Counsel Of Record
1755 U.S. 27 South
Sebring, Florida 33870
(813) 471-1119

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

78

QUESTION PRESENTED

Does the Florida prohibition against making obscene telephone calls with the intent to offend, annoy, abuse, threaten, or harass a listener, as recently construed by the Supreme Court of Florida below in *Gilbreath v. State*, violate the Petitioner's and other's rights to free speech guaranteed under the United States Constitution's First and Fourteenth Amendments?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITY iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 18

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

I CASES

Carey v. Brown, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) 14

Coates v. City Of Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971) 17

Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) 14

EU v. San Francisco Cty. Dem. Cent. Comm., 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) 14

Federal Election Comm. v. Mass Citizens For Life, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) 14

Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) 15

Gilbreath v. State, to be reported at, 650 So.2d 10 (Fla. 1995) 1, 9, 10

Gilbreath v. State, 629 So.2d 962 (Fla. 2DCA 1993) 1

Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972) 9, 11, 16, 17

Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) 15, 16

Gregory v. Chicago, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969) 14

Operation Rescue v. Women's Health Center, Inc., 626 So.2d 664 (Fla. 1993) 14, 15, 16

Perry Education Assn. v. Perry Local Educations Assn., 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) 14

TABLE OF AUTHORITIES – Continued

Page

Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 2. L.Ed.2d 542 (1969) 13

State v. Elder, 382 So.2d 687 (Fla. 1980) 11, 12

State v. Keaton, 371 So.2d 86 (1979) 11, 12, 16

II CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I ...2, 9, 14, 16

United States Constitution, Amendment XIV, Section I 2

III STATUTES

§ 365.16(1)(a) Fla. Stat. (1991) ..... *passim*

28 U.S.C. § 1257(a) 2

No. _____

In The

Supreme Court of the United States

October Term, 1994

SARA GILBREATH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Florida

PETITION FOR WRIT OF CERTIORARI

Petitioner Sara Gilbreath, respectfully prays that a Writ Of Certiorari issue to review the opinion of the Supreme Court of Florida entered on February 2, 1995, and is to be reported at 650 So.2d 10 (Fla. 1995).

OPINIONS BELOW

The Supreme Court of Florida's opinion is attached at App. 1. That opinion is to be reported at 650 So.2d 10 (Fla. 1995). The certiorari opinion of the District Court Of Appeal of Florida, Second District, affirming the Circuit Court's order on appeal is attached at App. 12. The District Court's opinion is published at 629 So.2d 962

(Fla. 2DCA 1993). The Circuit Court's order on appeal affirming the Petitioner's conviction for making an obscene or harassing phone call is reprinted at App. 14.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to review this case and grant the Petition for Writ Of Certiorari prayed for herein. The state court of last resort below, the Supreme Court of Florida, entered its opinion on February 2, 1995. This Court has jurisdiction to review the Petitioner's case pursuant to 28 U.S.C. § 1257(a), Petitioner having asserted below and is asserting herein the deprivation of rights secured by the United States Constitution. The requirements of this Court's Rule 13 are met as the opinion below was issued by a Florida court of last resort, and this petition is timely filed. Additionally, the issue presented herein was raised before the Circuit Court on appeal, the District Court of Appeal of Florida on certiorari review, and the Supreme Court of Florida on discretionary review.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

UNITED STATES CONSTITUTION AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or the press; or the right of the people peaceably

to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION AMENDMENT XIV, SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 365.16(1)(a) Fla. Stat. (1991)

(1) Whoever:

(a) Makes a telephone call to a location at which the person receiving the call has a reasonable expectation of privacy; during such call makes any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, vulgar, or indecent; and by such call or such language intends to offend, annoy, abuse, threaten, or harass any person at the called number; . . . is guilty of a misdemeanor of the second degree . . .

STATEMENT OF THE CASE

A. THE PROCEEDINGS BELOW

References to the pertinent parts of the record contained in the Appendix to this Petition shall be made as (App. ___) including the appropriate page number.

This case originated in the County Court in and for Highlands County, Florida. The Petitioner below was charged with making an obscene or harassing telephone call by complaint affidavit filed with the court on June 29, 1992. The Defendant, Sara Gilbreath, filed a written plea of not guilty on July 20, 1992. On July 7, 1992, the Honorable Olin W. Shinholser, Highlands County Judge, recused himself from this cause and the case was reassigned to administrative Circuit Judge, J. David Langford. The case was later assigned to Circuit Judge Joe R. Young to try the case as an acting County Judge. On August 4, 1992, the State filed a Notice of Intent, pursuant to the Williams rule to introduce evidence of other bad acts. On November 9, 1992, the State filed its Information for purposes of trial. (App. 22) After the Defendant's waiver of trial by jury, the court conducted a bench trial on November 13, 1992, the result of which was that the Defendant was found guilty and was sentenced. (App. 21) The Defendant filed a timely Notice of Appeal on December 3, 1992. In December, 1992, the State filed an ex parte Petition for Rule to Show Cause against the Defendant. A Rule to Show Cause was issued by the court on December 15, 1992. The Defendant filed a written response to the Rule to Show Cause and a Motion for Stay Pending Review. The court ultimately found the Defendant not to be in contempt of court. Further, the court granted Defendant's Motion for Stay Pending Review.

The Petitioner was originally sentenced after being found guilty on November 13, 1992. Additionally, after the hearing on the rule to show cause, the court modified its sentence without notice by sentencing the Defendant

to a period of six (6) months probation. At the time that the court modified the sentence, counsel for the Defendant informed the court that a timely notice of appeal had been filed on December 3, 1992. The matter then went to the Circuit Court on appeal.

The Circuit Court's "Order on Appeal" was entered on September 8, 1993 (App. 14), and affirmed Petitioner's conviction, but reversed that part of the lower court's sentence that required Petitioner to be on probation and to seek mental health evaluation and treatment. The Circuit Court determined that since the Petitioner's notice of appeal had been filed prior to the modification of her sentence that the sentence was made without jurisdiction. Although the Circuit Court reversed the sentence of probation and mental health counseling, it also held that such a sentence was proper on remand.

On Petition for Writ of Certiorari, the District Court of Appeal, Second District, affirmed the opinion of the Circuit Court and held that § 365.16(1)(a) Fla. Stat. (1991), was valid under the United States Constitution's First Amendment. (App. 12)

The Petitioner timely sought review of the District Court's certiorari opinion through the vehicle of discretionary review. The Supreme Court of Florida accepted jurisdiction and had the benefit of briefs and oral argument from the respective parties. On February 2, 1995, the Florida Supreme Court issued its written opinion below. (App. 1) The Supreme Court of Florida upheld the validity, as construed, of § 365.16(1)(a) Fla. Stat. (1991) and affirmed the Petitioner's conviction. (App. 1) Justice

Anstead dissented with an opinion in which Justice Kogan concurred. (App. 8)

B. THE FACTUAL BACKGROUND

At trial the State of Florida produced testimony to prove the following facts: On May 12, 1992, the alleged victim, Ron Hedgadis, and his stepson, Todd Silverwood, were at the Hedgadis home when the phone rang at 12:00 P.M. (App. 25) Todd Silverwood answered the phone and recognized the caller as the Defendant, Sara Gilbreath. (App. 26) Further, Mr. Silverwood testified that he could recognize the Defendant's voice because he had spoken to her many times before. (App. 26) Todd Silverwood testified that once he answered the phone the Defendant, Sara Gilbreath, asked to speak to Mrs. Hedgadis. (App. 27) Silverwood responded that his mother was not home. (App. 27) Mrs. Gilbreath then asked to speak to Ron Hedgadis and at that time Silverwood informed Hedgadis that Mrs. Gilbreath would like to speak to him. (App. 27) Additionally, Silverwood testified that he heard the alleged victim, Ron Hedgadis, use profane language in the past. (App. 30) Further, Mr. Silverwood testified that he had known the Defendant, Sara Gilbreath, for approximately nine (9) years as she was a family friend. (App. 30)

At trial, the alleged victim, Ron Hedgadis, testified that he had known the Defendant for over eight and a half (8 1/2) years and that he considered her a friend. (App. 35) Further, Mr. Hedgadis testified at first that he never socialized with Mrs. Gilbreath or her husband, and then later testified that he had been to the Gilbreath home

and had eaten dinner there. (App. 34) Mr. Hedgadis testified that prior to the subject phone call placed by the Defendant he had maintained a friendship with the Defendant and her husband. (App. 34, 35) The victim went on to testify that every time he spoke on the phone with the Defendant that he heard profanity, swearing, harassing words, and threats directed to third parties in the postal system where both Hedgadis and Mr. Gilbreath were employed. (App. 35) The alleged victim admitted that the Defendant had called him many times in the past. (App. 36) Further, Ron Hedgadis testified at trial that before he agreed to speak with Sara Gilbreath on May 12, 1992, that Todd Silverwood indicated to him that Sara was using profanity. (App. 44)

Prior to the phone call, the subject of the criminal proceeding below, the victim admitted that he consented to speak to Mrs. Gilbreath and explained, "I didn't want to be rude to her." (App. 38) During the phone call, Mr. Hedgadis testified that the Defendant started off inquiring into the whereabouts of Mrs. Hedgadis. After that question was answered, Mr. Hedgadis testified that Mrs. Gilbreath began using the usual foul language regarding third parties employed by the federal postal system in Highlands County, Florida. (App. 39) Additionally, Mr. Ron Hedgadis testified that the profanity was not directed at him and was not uttered to "cuss him out". (App. 48) Instead, he said the profane language was used to describe members of management in the Sebring post office where both Mr. Ron Hedgadis and Petitioner's husband worked. (App. 45-48) At the time the subject call was placed, Sara Gilbreath had permission to call the

Hedgadis home and speak to Mrs. Hedgadis. Sara did this frequently. (App. 44, 45)

At trial the Defendant entered testimony that she did not use profanity in the alleged conversation. Further, the Defendant presented the testimony of Roger Sams who testified that he had known Mr. Hedgadis for an extended period of time, and that Mr. Hedgadis quite frequently used very vulgar profanity in his conversations. The victim, Ron Hedgadis' entire trial testimony is contained in the appendix at App. 33-52.

REASONS FOR GRANTING THE WRIT

The Petitioner's and other's rights to freedom of speech guaranteed in the United States Constitution's First and Fourteenth Amendments are violated by the prohibition contained in § 365.16(1)(a) Fla. Stat. (1991) as that statute is unconstitutionally vague and overbroad, and places a chilling effect on the exercise of First Amendment rights in Florida.

The requirements for review as set out in this Court's Rule 10(1)(c) are met by the Petitioner's case as the Supreme Court of Florida's decision conflicts with the applicable decisions of this Honorable Court.

On May 12, 1992, the Petitioner/Defendant, Sara Gilbreath, sought to avail herself of her right to free speech guaranteed in the United States Constitution's First and Fourteenth Amendments. On that day Petitioner called a family friend in order to speak with him regarding matters that occurred at his place of employment,

where Petitioner's husband was also employed. However, after availing herself of her rights to free speech on May 12, 1992, the State of Florida intervened and criminally prosecuted the Petitioner for her call to the family friend and thereby violated the Petitioner's protections of freedom of speech.

The First Amendment to the United States Constitution provides that,

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In the case of *Gilbreath v. State*, to be reported at 650 So.2d 10 (Fla. 1995) the Supreme Court of Florida erred in upholding the constitutional validity of § 365.16(1)(a) Fla. Stat. (1991). The statute as written and published is vague on its face, and further is overbroad as it proscribes what is protected under the First Amendment. In its attempt to salvage a questionable state law the Supreme Court of Florida has struck an unconstitutional balance that intrudes too far into the protected domain of the individual's right of free speech. The chilling effect of § 365.16(1)(a) Fla. Stat. (1991) on First Amendment rights is significantly greater than that of the Georgia statute struck down by this Court in the controlling precedent of *Gooding v. Wilson*, infra p. 16.

Additionally, there are two irregularities with the Supreme Court of Florida's opinion below that are noteworthy. First, the court recited the contents of a complaint affidavit in its opinion. That complaint affidavit was

never entered into evidence at trial. The language contained in the affidavit was not proved at trial, except for several phrases contained at App. 52. Second, the Florida Supreme Court stated in its opinion that § 365.16(1)(a) Fla. Stat. (1991) did not apply to cases where there was an intent to offend or annoy. (App. 8) While making that holding the court affirmed the Circuit Court's order finding that the Petitioner intended to offend the victim. (App. 2, 18) There is no clarifying language in the court's opinion to justify this incongruence.

In his dissenting opinion in *Gilbreath* below, Justice Anstead of the Supreme Court of Florida stated,

> " . . . The statute as now drafted still punishes speech that takes place in a consensual telephone conversation, if, during that conversation, the caller decides to 'annoy' or 'offend' her partner in conversation by the use of a 'dirty' word. For example, friends discussing politics in a friendly conversation may often violate this statute when they reach a point of disagreement and one uses a 'dirty' word to 'annoy' or 'offend' the other . . . " (App. 10)

Justice Kogan concurred with Justice Anstead's written dissent.

In the majority opinion below the Supreme Court of Florida acknowledged constitutional infirmity with the subject statute by limiting its application and excising the "indefinite and vague terms" offend and annoy. (App. 7) However, this attempt at placing a saving construction on the statute falls short of eliminating its overbreadth and chilling effect on First Amendment rights.

The Supreme Court of Florida cannot in reality excise language from a statute. Only the Florida legislature may amend statutory language. The court may only place a limiting construction on the statute. Here, however, in the arena of First Amendment free speech rights, a limiting construction does not offer enough. The vague language of § 365.16(1)(a) Fla. Stat. (1991) is still on the books and, therefore, still fosters a chilling effect on those who read the language contained in the statute.

The limiting construction placed on the statute below still does not provide the precise tool required that would not proscribe protected speech. For this reason § 365.16(1)(a) Fla. Stat. (1991) remains unconstitutionally overbroad. See, *Gooding v. Wilson*, infra p. 16.

A prior version of § 365.16(1)(a) Fla. Stat. (1991) has already been struck down by the Supreme Court of Florida in its opinion in *State v. Keaton*, 371 So.2d 86 (1979). In *Keaton* the Court held that the prior version of § 365.16(1)(a) Fla. Stat. (1991) would punish protected speech, and was therefore unconstitutionally overbroad. In *State v. Elder*, 382 So.2d 687 (Fla. 1980), the court clarified its *Keaton* Opinion and stated that,

> What was broadly proscribed under § (1)(a), then, was not simply the act of making an uninvited obscene telephone call, but also the content of pure speech consensually communicated through a telephone. We declined in *Keaton* to uphold § 365.16(1)(a) by narrowly construing its prescribed 'obscenity' as defined under *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), a form of expression unprotected in

> the public forum because the statute could nevertheless contravene the first amendment in failing to contain the essential qualifying element of an unwilling listener.

In construing a state statute the Supreme Court of Florida has determined previously that it has a responsibility to resolve all doubts as to the validity of a statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the intent of the legislature. See, *Elder*, 382 So.2d at 690; see also *Keaton*, supra. Additionally, in dealing with the statutory regulation of First Amendment activity the Florida courts have in the past strictly construed the challenged statute to uphold it against vagueness or overbreadth attacks. See, *Elder*, 382 So.2d at 691. On it's face the scope of the present § 365.16(1)(a) Fla. Stat. (1991) is not specifically limited to cases where the listener does not consent to the use of the proscribed language, despite the Florida Supreme Court's holding in *Keaton*; § 365.16(1)(a) Fla. Stat. (1991) provides that:

> (1) Whoever:
>
> (a) Makes a telephone call to a location at which the person receiving the call has a reasonable expectation of privacy; during such call makes any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, vulgar, or indecent; and by such call or such language intends to offend, annoy, abuse, threaten, or harass any person at the called number; . . . is guilty of a misdemeanor of the second degree . . .

Citizens reading this statutory provision might reasonably believe it criminalizes telling off-color jokes to a willing listener, or forbids sexually oriented conversation between lovers, or other consenting adults. Despite the court's advisory language contained in *Keaton*, the language eventually adopted by the legislature in the new statute does not state a requirement for an unwilling listener. The statute in its present form is still so broad that it has a chilling effect on the freedom of speech and allows the prosecution of those individuals whose speech may not be constitutionally proscribed. Here, the vague language of § 365.16(1)(a) Fla. Stat. (1991) has resulted in Petitioner's wrongful conviction. The language of § 365.16(1)(a) Fla. Stat. (1991) allowed the trial court to convict the Petitioner where the alleged victim consented to the conversation. (App. 38) By the victim's own admission he testified that he knew Sara Gilbreath would utter obscene language before he (victim) accepted the call. (R-19, 25) The mere use of obscene language in a telephone conversation is not punishable. *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

The Petitioner's conviction is clear proof that § 365.16(1)(a) Fla. Stat. (1991) is vague and overbroad. The victim in this case, (1) consented to speak to the Petitioner (App. 38); (2) testified that his stepson, who answered the telephone, indicated to him that she was using profanity at the time he gave his consent, (App. 44); and (3) the victim said that he was a friend of the Petitioner and every time he had spoken to her in the past she used profane language. (App. 35) Here these facts prove Mr. Ron Hedgadis was a willing listener.

The threshold analysis that must be made to determine whether or not the State has violated the Petitioner's First Amendment rights is to determine the forum in which the rights are, or were, exercised. Here, the Petitioner exercised her rights to freedom of speech in the non-public forum. See, *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 799-800, 105 S.Ct. 3439, 3447, 87 L.Ed.2d 567 (1985); *Operation Rescue v. Women's Health Center, Inc.*, 626 So.2d 664 (Fla. 1993). Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and the viewpoint neutral. See, *Perry Education Assn. v. Perry Local Education Assn.*, 460 U.S. 37, 49, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Once the type of forum is determined this Court must then turn to whether or not the statute is "narrowly tailored to serve a significant government interest and whether it leaves open ample alternative channels of communication: See, *Perry; EU v. San Francisco Cty. Dem. Cent. Comm.*, 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) and *Federal Election Comm. v. Mass Citizens For Life*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). The Petitioner recognizes that, "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471, 100 S.Ct. 2286, 2296, 65 L.Ed.2d 263 (1980). This Honorable Court has held that the home has a unique nature, "the last citadel of the tired, the weary, and the sick,". See *Gregory v. Chicago*, 394 U.S. 111, 125, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969). Further in the

case of *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), this Court held at U.S. 484,

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear . . . Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

The Petitioner having recognized that the speech complained of occurred in an non-public forum and that the State has a significant interest in protecting unwilling listeners from any type of speech in their home, the next analysis must turn to whether the statute is narrowly tailored. It is not. The statute is too vague and overbroad. It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. See, *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972); *Operation Rescue*, 626 So.2d at 674. On the question of the overbreadth of statutes like § 365.16(1)(a) Fla. Stat. (1991) this Court has noted that,

> A clear and precise enactment may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct. . . . The crucial question, then, is whether the ban sweeps within its prohibitions what may not be punished under the First . . . Amendment.

Grayned, 408 U.S. at 114-115, 92 S.Ct. at 2302; *Operation Rescue*, 626 So.2d at 674-675.

The present § 365.16(1)(a) Fla. Stat. (1991) meets the definition of being vague in that the element of the crime of an unwilling listener is not stated, but is merely assumed. The fact that this element of the crime was added by the court in *Keaton* by judicial caveat does not save the language of present § 365.16(1)(a) Fla. Stat. (1991) from not clearly defining its elements. The vague words "annoy" and "offend" also still appear in the statute. Additionally, the statute is overbroad as demonstrated by the facts of the present case where the Petitioner was convicted, and here the residential listener consented to the conversation knowing that the Petitioner would use profane language during the course of the conversation. Therefore, here the proscription of § 365.16(1)(a) Fla. Stat. (1991) sweeps within its prohibitions what may not be punished under the First Amendment. The listener here, after consenting to the conversation, did not like its content, and later initiated a criminal prosecution pursuant to § 365.16(1)(a) Fla. Stat. (1991).

In the case of *Gooding v. Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972), this Court determined a challenge to a Georgia statute that proscribed certain language with the result that the statute was struck down. In *Gooding* this Honorable Court determined that the Georgia statute punished only spoken words. Holding,

> Section 26-6303 punishes only spoken words. It can therefore withstand Appellee's attack upon

> its facial constitutionality only if, as authoritatively construed by the Georgia courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendment.

Further, in *Gooding*, 405 U.S. at 521 the Court noted that,

> Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as to others. And if the law is found deficient in one of these respects, it may not be applied to him either until and unless the satisfactory limiting construction is placed on the statute.

Additionally this Court cited to *Coates v. City of Cincinnati*, 402 U.S. 611, 619-20, 91 S.Ct. 1686, 1691, 29 L.Ed.2d 214 (1971) as authority for that language in *Gooding*. The analysis that this Court used in *Gooding* to strike down the Georgia statute would require the Court to strike down § 365.16(1)(a) Fla. Stat. (1991). The Petitioner's conviction below is proof that the statute, as phrased, is subject to misapplication by the police, prosecutors, and trial courts.

If this Honorable Court determines that § 365.16(1)(a) Fla. Stat. (1991) is not void, then the Petitioner would provide that her conviction on these facts violated the constitutional protections enumerated above. Where, as here, the listener was willing, even after his stepson advised him that the caller was using profanity. The Petitioner's conviction cannot stand under this Court's ruling in *Gooding*, supra.

The founding Fathers' dreams and beliefs that served as the foundation for our great nation cry for life in this cause. Without this Honorable Court's intervention the freedoms recognized in our Constitution so many years ago will simply appear as fading granite or bronze relics of a bygone age. This Court, however, may keep life's breath in the great freedoms by granting Certiorari herein and awarding the Petitioner the relief she has previously sought so unsuccessfully in all Florida Courts.

CONCLUSION

The Petitioner, Sara Gilbreath, by and through the undersigned counsel, respectfully prays that this Honorable Court grant her Petition and issue the Writ Of Certiorari to the Supreme Court of Florida, review this cause, reverse the Petitioner's conviction, and grant such further relief as is consistent with this Petition and the interests of justice.

Respectfully submitted,

GARY R. GOSSETT, JR., Esquire
Counsel Of Record
for the Petitioner

SUPREME COURT OF FLORIDA

No. 83,090

SARA GILBREATH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

[February 2, 1995]

WELLS, J.

We have for review a decision of the district court that expressly declares to be valid section 365.16(1)(a), Florida Statutes (1991). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

Petitioner was charged with making an obscene or harassing telephone call to the home of Ronald A. Hegadis, a postal service management employee. Mr. Hegadis filed a complaint/arrest affidavit against petitioner in which he set forth the following statements made by petitioner to him:

> [S]he requested to know what the fuck was going on at the post office, the fucking harassment on Jimmy (her husband) and stated that god damn fucking bitch-whore Mary Lou called for a fucking investigative report on Jimmy, and the fucking bitch falsified the documents. She stated that she followed that fucking-bitch-whore Mary Lou to her god damn driveway last night and if that bitch called her boss (Caldwell

> Banker Realty) and cause [sic] her to lose her job, her motherfucking ass is gone. She stated fuck those bastards you can't communicate with fucking idiots. She said if those motherfucking cocksuckers don't quit messing with them, they would all be gone starting with that fucking bitch Thulbery (postmaster) fucking whore-bitch Mary Lou, the cocksucking two faced Al Mann, and that pussy-wimp, white faced, pencil-dick cocksucking, red-haired motherfucking Ed White. She didn't give a fuck and it would be worth it to get rid of all of their fucking asses.

In a bench trial before the county court, the postal employee testified that over a two-year period prior to the subject telephone call, he had received at his home approximately 30 similar calls from petitioner. The postal employee testified that he asked petitioner not to call him, told her that he did not like the language she used or the threats she made, and told her he would not relay the threats to the other postal employees. The postal employee further testified that he believed petitioner called him at home to harass him, that these calls annoyed and offended him, and that the threats were aimed at him because he was in a management position at the post office.

The trial court found petitioner guilty of making an obscene or harassing phone call in violation of section 365.16(1)(a), Florida Statutes (1991). This conviction was appealed to the circuit court. In a well-written and well-reasoned order on appeal, the circuit court affirmed the conviction and sustained the statute against the attack that it was an unconstitutional infringement of the right to free speech.

Petitioner sought review from the district court of appeal, which approved the circuit court's decision declaring section 365.16(1)(a), Florida Statutes (1991), valid. We agree with the circuit court's reasoning and approve the decision of the district court. We do, however, narrow the statute's scope by limiting it to telephone calls in which the caller possesses an intent to abuse, threaten, or harass.

We believe the essential point of this case was correctly assessed by the circuit court in its order.

> The constitutionality of this statute originally came into question and was addressed by the Florida Supreme Court in *State v. Keaton*, [371] So. 2d 86 (Fla 1979). The statute originally was worded: "365.16(1) Whoever by means of telephone communication: (a) Makes any comment, request, suggestion, or proposal which is obscene, lewd lascivious, filthy, or indecent . . . shall be guilty of a misdemeanor of the second degree. . . . " The *Keaton* court held that the statute was unconstitutional as it was not limited to cases where the listener did not consent to the use of the proscribed language and that it therefore [was] in violation of the First Amendment freedom of speech. That court specifically stated:
>
> > We do not hold that the state may not proscribe obscene telephone communications regardless of the circumstances. Were section 365.16(1)(a) limited to obscene calls to a listener at a location where he enjoys a reasonable expectation of privacy (such as the home) which calls are intended to harass

> the listener, the enactment would pass constitutional muster. Because such a statute would assume the existence of a listener who is unwillingly subjected to vulgar or obscene epithets, it would constitute a valid legislative attempt to protect the substantial privacy interests of the listener.

After this case was decided, the legislature amended the statute to read:

> 365.16. **Obscene or harassing telephone calls**
>
> (1) Whoever:
>
> (a) Makes a telephone call to a location at which the person receiving the call has a reasonable expectation of privacy; during such call makes any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, vulgar, or indecent; and by such call or such language intends to offend, annoy, abuse, threaten, or harass any person at the called number;
>
> . . . .
>
> is guilty of a misdemeanor of the second degree. . . .

The amended statute complies with the express requirements of the Florida Supreme Court as announced in *Keaton*. The issue of the constitutionality of the amended statute has never arisen, although subsections (b) through (d) were deemed not to be violative of constitutionally protected rights in *State v. Elder*, 382 So. 2d 687 (Fla. 1980). The *Elder* court mentions subsection (1)(a) only for the purpose of discussing its decision in *Keaton*. There are no cases

> dealing specifically with the constitutionality of §365.16(1)(a).
>
> Appellant argues that lack of consent is a specific constitutional requirement for a statute such as §365.16. However, the Florida Supreme Court stated in *Keaton* that a statute worded as the amended statute is would assume an unwilling listener. *Keaton* at 92. The Appellee argues that the phrase " . . . to a location at which the person receiving the call has a reasonable expectation of privacy; . . . " allows for the constitutionality of the statute per *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484, 25 L. Ed. 2d 736 (1979). This Court agrees with that position and recognizes that the right of free speech is sometimes outweighed by privacy interests, here the privacy interests of the listener, Mr. Hegadis. *Elder* at 692. Accordingly, this Court finds that §365.16(1)(a) is not in violation of Appellant's constitutional rights of free speech or due process.

Gilbreath v. State, No. 92-55 (Fla. 10th Cir. Ct. September 8, 1993).

The district court emphasized, as do we, that the breadth of the statute was limited by its post-*Keaton* amendment which restricted the statute only to telephone communications made to a person at a location where that person has a reasonable expectation of privacy, with an intent to offend, annoy, abuse, threaten, or harass. We do further restrict the statute only to calls or language that intend to abuse, threaten, or harass.

With these restrictions we find section 365.16(1)(a) valid for reasons similar to those upon which we found subsection (1)(b) valid. In *State v. Elder*, 382 So. 2d 687,

690 (Fla. 1980), we noted that subsection (1)(b) of this statute was not a proscription of pure speech. Rather, we held that the statutory provision was not directed at the communication of opinions or ideas but at conduct that is the act of making a telephone call or a series of telephone calls without disclosing identity with the intent to annoy, abuse, threaten, or harass the recipient of the call. Though subsection (1)(a) of the statute pertains to identified callers rather than anonymous callers, as under subsection (1)(b), the intent requirement of the statute is presently the same and, similarly, it is the conduct of intentionally making such a call into a place of expected privacy, not pure speech, which is proscribed.

Aptly, the United States Court of Appeals, Fourth Circuit, stated an obvious fact of modern life:

> The government has a strong and legitimate interest in preventing the harassment of individuals. The telephone, a device used primarily for communication, presents to some people a unique instrument through which to harass and abuse others. Because the telephone is normally used for communication does not preclude its use in a harassing course of conduct. . . . "Prohibiting harassment is not prohibiting speech, because harassment is not a protected speech. Harassment is not communication, although it may take the form of speech. The statute prohibits only telephone calls made with the intent to harass. Phone calls made with the intent to communicate are not prohibited. Harassment, in this case, thus is not protected merely because it is accomplished using a telephone."

Thorne v. Bailey, 846 F.2d 241, 243 (4th Cir.) (quoting *State v. Thorne*, 333 S.E.2d 817, 819 (W. Va.), *cert. denied*, 474 U.S. 996, 106 S. Ct. 413, 88 L. Ed. 2d 363 (1985)), *cert. denied*, 488 U.S. 984, 109 S. Ct. 538, 102 L. Ed. 2d 569 (1988).

The petitioner acknowledges, as do we, that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471, 100 S. Ct. 2286, 2296, 65 L. Ed. 2d 263 (1980). In the case of *Frisby v. Schultz*, 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988), the Court held:

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. . . . [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

487 U.S. at 484-85 (citations omitted). We believe that the statute at issue protects this interest by limiting its application to calls made to a listener with the intent to abuse, threaten, or harass where the listener has a reasonable expectation of privacy.

We narrow the statute's construction and excise the indefinite and vague terms "offend" and "annoy." We do this in accord with the court's discretion to limit a statute to what is constitutional when the statute as so limited is

complete in itself and consistent with the stated or obvious legislative intent. *State v. Stalder,* 630 So. 2d 1072 (Fla. 1994); *Garden v. Frier,* 602 So. 2d 1273 (Fla. 1992); *Firestone v. News-Press Publishing Co.,* 538 So. 2d 457 (Fla. 1989). We conclude that the intent of this statute is to prohibit intentional abusive, threatening, and harassing conduct by use of the telephone in the manner specified against a person where that person has an expectation of privacy. "Offend" and "annoy" are indefinite as to meaning and give rise to subjective vague connotations. The statute is complete and sufficiently narrow without these terms.

Petitioner further has asserted that even if the statute is constitutional, there was insufficient evidence presented at the trial to sustain her conviction. Our review of the record reveals that there was indeed sufficient evidence for the trial court to find petitioner guilty of a violation of the statute as we have narrowed it.

Therefore the decision of the district court is approved, and the statute is valid as limited and narrowed by this decision.

It is so ordered.

GRIMES, C.J., and OVERTON and SHAW, JJ., concur.

HARDING, J., concurs in result only.

ANSTEAD, J., dissents with an opinion, in which KOGAN J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

ANSTEAD, J., dissenting.

Because the scope of this statute remains as broad as the statute we considered in *State v. Keaton*, 371 So. 2d 86 (Fla. 1979), I think we are bound by *Keaton* to again invalidate the statute. In *Keaton* we held:

> Because the scope of section 365.16(1)(a) is not limited to cases where the listener does not consent to use of the proscribed language, a citizen reading the provision might reasonably believe that it criminalizes telling an "off-color joke" to a willing listener or forbids a sexually oriented conversation between lovers. Such a prohibition constitutes a violation of the first amendment freedom of speech. Even if subsection (1)(a) is construed to encompass only language defined as obscene under *Miller v. California*, the enactment is nevertheless violative of this first amendment right because it does not contain the essential qualifying element – an unwilling listener. Our conclusion in this regard is grounded upon the decision of the United States Supreme Court in *Stanely v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L.Ed. 2d 542 (1969).
>
> . . . .
>
> Just as the first amendment freedom of speech protects the right of an individual to possess obscene matter in his own home, this freedom also prohibits the punishment of the mere use of obscene language in a telephone communication. We recognize that a prosecution for an obscene telephone call to which the listener does not object would rarely occur, for absent an offended party to report the incident, it would generally not come to the attention of law enforcement officials. However, the danger

of an overbroad statute lies in its possible chilling effect upon the exercise of a precious first amendment right by those who read its provisions. In invalidating the "public obscenity" statutes in *Spears v. State*, 337 So. 2d 977, we acknowledged this risk:

> Overbroad statutes create the danger that a citizen will be punished as a criminal for exercising his right of free speech. If this possibility were the only evil of overbroad statutes, it might suffice to review convictions on a case by case basis. But the mere existence of statutes and ordinances purporting to criminalize protected expression operates as a deterrent to the exercise of the rights of free expression, and deters most effectively the prudent, the cautious and the circumspect, the very persons whose advice we seem generally to be most in need of.

Id. at 980.

Id. at 90-93 (footnote omitted).

The statute as now drafted still punishes speech that takes a place in a consensual telephone conversation if, during that conversation, the caller decides to "annoy" or "offend" her partner in conversation by the use of a "dirty" word. For example, friends discussing politics in a friendly conversation may often violate this statute when they reach a point of disagreement and one uses a "dirty" word to "annoy" or "offend" the other. It is just that kind of speech that this Court held was protected in *Keaton*.

I agree that the state could prohibit non-consensual obscene calls made to a person's home with the specific

intent to harass the person called. The statute before us, however, is much broader than this, and I question our authority to rewrite and limit the statute in this way.

KOGAN, J., concurs.

Application for Review of the Decision of the District Court of Appeal – Statutory Validity

Second District – Case No. 93-03330

(Highlands County)

Gary R. Gossett, Jr., Sebring, Florida,
for Petitioner

Robert A. Butterworth, Attorney General; Robert J. Krauss, Senior Assistant Attorney General, Chief of Criminal Law, and Brenda S. Taylor, Assistant Attorney General, Tampa, Florida.

for Respondent

NOT FINAL UNTIL TIME EXPIRES TO
FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA
SECOND DISTRICT

SARA GILBREATH,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 93-03330

Opinion filed December 22, 1993.

Petition for Writ of Certiorari
to the Circuit Court for the
Tenth Judicial Circuit for
Highlands County, sitting in
its appellate capacity.

Gary R. Gossett, Jr.,
Sebring, for Petitioner.

Robert A. Butterworth,
Attorney General, Tallahassee,
and Brenda S. Taylor,
Assistant Attorney General,
Tampa, for Respondent.

PER CURIAM.

Sara Gilbreath seeks certiorari review of the circuit court's order affirming her conviction for "obscene or harassing telephone calls." § 365.16(1)(a), Fla. Stat. (1991).

Of the several issues raised in the petition, only one warrants extended discussion. Gilbreath argues that the statute under which she was charged is facially unconstitutional for two reasons. First, she claims that the statute infringes upon First Amendment guarantees of free speech. Second, she argues that the statute is impermissibly overbroad and subject to misapplication. The circuit court disposed of both arguments in a well-reasoned order, which we affirm.

A prior incarnation of the statute was invalidated on constitutional grounds. *State v. Keaton*, 371 So. 2d 86 (Fla. 1979). The old statute arguably penalized obscene calls without regard to whether the recipient consented to hear them. Accordingly, the supreme court found the statute unacceptably vague and potentially violative of First Amendment rights of free speech. In declaring the statute invalid, the court made it clear that the state could "proscribe obscene telephone communications . . . to a listener at a location where he enjoys a reasonable expectation of privacy (such as the home) which calls are intended to harass the listener." 371 So. 2d at 92. This "expectation of privacy" language was then explicitly written into the statute, and certain confusing phraseology was clarified, by legislative amendment. In the view of the circuit court, and ours, the constitutional infirmities that prompted the decision in *Keaton* have thereby been cured. *And see State v. Elder*, 382 So. 2d 687 (Fla. 1980), involving subsection (b) of the same statute, which proscribes anonymous calls which are intended to annoy or harass.

Petition denied.

SCHOONOVER, A.C.J., HALL and BLUE, JJ., Concur.

IN THE CIRCUIT COURT OF THE TENTH
JUDICIAL CIRCUIT
IN AND FOR HIGHLANDS COUNTY, FLORIDA

SARA GILBREATH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

APPEAL NO: 92-55
CASE NO: MM92-1056A1-XX

(Filed Oct. 5, 1993)

ORDER ON APPEAL

APPELLANT, Sara Gilbreath, seeks review of the trial court's decision finding her guilty of the offense of making an obscene or harassing phone call in violation of §365.16(1)(a), FLA. STAT. The record reveals that Appellant was charged with this offense after making a phone call to the victim, Ron Hegadis, in which she used obscene and threatening language. Mr. Hegadis stated that he had received such calls from Appellant in the past and had asked her not to call him again as he did not like the language Appellant used or the threats she made. After a bench trial on November 11, 1992, Appellant was found guilty and was sentenced. The trial court withheld adjudication and ordered Appellant to file a mental evaluation report that had been prepared by a Dr. Mercer with the State. The agreement was that if the state approved of the report, which supposedly suggested that Appellant did not need any counseling, then no counseling would be ordered by the trial court. Appellant filed a timely notice of appeal on December 3, 1992. In response to an ex parte Petition for Rule to Show Cause from the State,

the trial court issued a Rule to Show Cause to Appellant setting a hearing at which time she could show cause why she should not be held in contempt for her failure to produce the report. Appellant filed a written response to the Rule to Show Cause on December 15, 1993 along with a motion for Stay Pending Review. A hearing was held by the trial court on December 21, 1992, at which time the trial court, notwithstanding Appellant's advisement that a notice of appeal had been filed, placed Appellant on six months probation and ordered Appellant to undergo a mental evaluation. By written orders on January 11, 1993, the trial court granted Appellant's Motion for Stay Pending Review and on the rule to show cause, specifically found Appellant not to be in contempt of court.

Appellant raises three issues on appeal:

1 – Whether §365.16(1)(a), Fla. Stat., presents an unconstitutional infringement on Appellant's rights.

2 – Whether the trial court erred in finding Appellant guilty of a violation of §365.16(1)(a), where the evidence presented at trial was insufficient to prove the crime charged.

3 – Whether the trial court erred in sentencing the Appellant to obtain a psychiatric evaluation and treatment and in modifying its sentence after a timely notice of appeal was filed.

Appellant correctly argues that although the constitutionality issue was not raised at trial, this Court can review the issue as it may involve fundamental error. *State v. Smith*, 240 So. 2d 807. There are two arguments to Appellant's first issue on appeal: first, the statute is void

as being in violation of free speech protections; and, second, when Appellant was charged with this "void crime", her right to due process was violated. The Court will address these contentions together by discussing the case law surrounding the statute in question.

The constitutionality of this statute originally came into question and was addressed by the Florida Supreme Court in *State v. Keaton*, 571 So. 2d 86 (Fla. 1979). The statute originally was worded: "365.16(1) Whoever by means of telephone communication: (a) Makes any comment, request, suggestion, or proposal which is obscene, lewd lascivious, filthy, or indecent . . . shall be guilty of a misdemeanor of the second degree . . . " The *Keaton* court held that the statute was unconstitutional as it was not limited to cases where the listener did not consent to the use of the proscribed language and that it therefore [sic] in violation of the First Amendment freedom of speech. That court specifically stated:

> We do not hold that the state may not proscribe obscene telephone communications regardless of the circumstances. Were section 365.16(1)(a) limited to obscene calls to a listener at a location where he enjoys a reasonable expectation of privacy (such as the home) which calls are intended to harass the listener, the enactment would pass constitutional muster. Because such a statute would assume the existence of a listener who is unwillingly subjected to vulgar or obscene epithets, it would constitute a valid legislative attempt to protect the substantial privacy interests of the listener.

After this case was decided, the legislature amended the statute to read:

365.16. **Obscene or harassing telephone calls**

(1) Whoever:

(a) Makes a telephone call to a location at which the person receiving the call has a reasonable expectation of privacy; during such call makes any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, vulgar, or indecent; and by such call or such language intends to offend, annoy, abuse, threaten, or harass any person at the called number;

* * *

is guilty of a misdemeanor of the second degree . . .

The amended statute complies with the express requirements of the Florida Supreme Court as announced in *Keaton*. The issue of the constitutionality of the amended statute has never arisen, although subsections (b) through (d) were deemed not to be violative of constitutionally protected rights in *State v. Elder*, 382 So. 2d 687 (Fla. 1980). The *Elder* court mentions subsection (1)(a) only for the purpose of discussing its decision in *Keaton*. There are no cases dealing specifically with the constitutionality of §365.16(1)(a).

Appellant argues that lack of consent is a specific constitutional requirement for a statute such as §365.16. However, the Florida Supreme Court stated in *Keaton* that a statute worded as the amended statute is would assume an unwilling listener. *Keaton* at 92. The Appellee argues that the phrase " . . . to a location at which the person receiving the call has a reasonable expectation of privacy; . . . " allows for the constitutionality of the statute

per *Rowan v. United States Post Office Dept.*, 397 U. S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1979). This Court agrees with that position and recognizes that the right of free speech is sometimes outweighed by privacy interests, here the privacy interests of the listener, Mr. Hegadis. *Elder* at 692. Accordingly, this Court finds that §365.16(1)(a) is not in violation of Appellant's constitutional rights of free speech or due process.

Appellant's second issue on appeal centers around the argument that the Appellee failed to prove Appellant committed the crime charged beyond a reasonable doubt. To the contrary, this Court finds the record is clear that the victim had asked Appellant not to call him at home because he did not like the language or threats, that Appellant did call the victim at home, which goes only to show that he consented to take the call – not that he consented to being confronted with abusive language, that the language used by Appellant was obscene, lewd, lascivious, filthy, vulgar, or indecent, and that when Appellant had been requested by the victim to not call him and speak thusly and she, nonetheless did just that, it could only have been Appellant's intent to offend the victim. Even were this not the case, because of the presumption that the decision of the trial court will not be disturbed on appeal absent a showing of an abuse of discretion by the trial court, this Court would find no error as Appellant has failed to show an abuse of discretion. *Delgado v. State*, 360 So. 2d 73 (Fla. 1978).

Part of Appellant's third issue, that the trial court lacked jurisdiction to modify Appellant's sentence after Appellant had filed a timely notice of appeal, is correct. *Critton v. State*, 604 So. 2d 933 (Fla. 1 DCA 1992); *Dailey v.*

State, 575 So. 2d 237 (Fla. 2 DCA 1991). Appellee's argument that the trial court's 60 day sentence was for contempt of court is clearly erroneous as the record contains a written order of the trial court specifically stating that Appellant was found to not be in contempt of court. Therefore, the order of the trial court sentencing Appellant to 60 days probation and requiring her to have a mental evaluation is REVERSED AND REMANDED. Upon remand, at which time proper jurisdiction will lie with the trial court, Appellant may be sentenced to 60 days probation. This Court would also find no error in a requirement that Appellant undergo a psychiatric or mental evaluation to determine the need for counseling or treatment. Appellee is correct that §948.011, FLA. STAT., gives the trial court discretion to assign probation as well as conditions for that probation. Appellant argues that the condition of probation that she undergo a mental evaluation and possible treatment is not related to the offense of conviction and cites *Rodriguez v. State*, 378 So. 2d 7 (Fla. 2d DCA 1979). Appellant further contends that there is nothing in the record to indicate that Appellant had a mental defect or that such a condition contributed to the commission of the crime. While there may be no specific allegation that Appellant had a mental defect, the trial court certainly had the advantage of seeing Appellant and hearing all of the testimony in making its determination that there may be some continuing problem and that there may be some way to avoid that problem. Even this Court, taking into consideration the nature of Appellant's threats, would question the cause of Appellant's actions, and accordingly agrees with the trial court's actions. Besides that, Appellant never objected to this

condition and presumably even predicted that it may be imposed as evidence by the pre-trial evaluation supposedly performed by Dr. Mercer. In any case, this Court would find no error if, on remand, the trial court reimposed this condition upon Appellant.

It is therefore

ORDERED AND ADJUDGED that the conviction of Appellant is AFFIRMED. The sentence of 60 days probation and the conditions placed on that probation is, however, REVERSED AND REMANDED.

DONE AND ORDERED on this 8th day of Sept., 1993.

/s/ Randall G. McDonald
RANDALL G. MCDONALD
Chief Judge

Copies furnished to:

Gary R. Gossett, Jr., Esquire
3750 U. S. 27 North, Suite 12
Sebring, Florida 33870

Linda Davis Grable, Assistant State Attorney
534 South Commerce Avenue
Sebring, Florida 33870

JURY TRIAL

DISPOSITION MEMORANDUM

IN THE CIRCUIT/COUNTY COURT HIGHLANDS COUNTY, FLORIDA/CRIMINAL DIVISION

CLASS.	WARRANTS	PAGE

BI #:9206101

DIV: M1 13 DATE: 11/09/92 BONDSMAN: COCHRAN DEF LOC. COCHRAN BOND SARA

CASE NO.: MM92-1050A1-XX STATE VS.: GILBREATH FINE/CST 420132 BD SRTY/CA:

CO# CT.#

. 001 1 MAKE OBSCENE PHONE CALL

NO MORE CHARGES

State Attorney GRABLE Judge OLIN SHINHOLSER

DEFT. LINDA DAVIS ☐ FTA ☑ PRES. ☐ NOT PRES. ☑ ATTY. Steingold

PLEA

- ☐ P.N.G. Withdrawn
- ☐ Guilty
- ☐ Not Guilty ☐ Written ☐ Denial
- ☐ Nolo Cont.
- ☐ Admits VOP/VOCC ☐ Revoked ☐ Restored
- ☑ Non Jury Trial Starts 9:45am ☐ Jury Verdict

ADJUDICATION

- ☐ Guilty
- ☐ Not Guilty
- ☑ Withheld
- ☐ Withheld Pending Disposition
- ☐ Modified ☐ Terminated

- ☐ **Capias withdrawn by order of Judge** ☐ PD Appointed ☑ No Contact w/Victim
- ☐ Capias ordered Bond set at $
- ☐ $ Bond Estreated ☐ Bond reduced to $ ☐ Remanded to Custody H.C.S.O.
- ☐ **Defendant referred for** ☐ P.S.I. ☐ PDR ☐ Alcohol Clauses ☐ Drug Clauses
- ☐ **Defendant placed on** ☐ Probation ☐ Community Control for
- ☐ Substance/Mental Eval. ☐ DWI School w/in Days ☐ DDS w/in Days ☐ NCTI w/in Days
- ☐ DL Susp. Months ☐ Hours Community Service within Months/Days
- ☐ Tri-County Eval/Enroll within ☐ Restitution ordered within Days/Months/Years
- ☐ State to Nolle Prosequi ☐ Dismissed by Court ☐ Written/Oral No Bill
- ☐ May show valid DL to Clerk's Office - Room 203, prior to court date W/Lic. w/o Lic.

WJT

Court finds Def - Guilty

Doctor memo's report to be filed with state, & advised no further counseling needed

IT IS THE JUDGMENT OF THE COURT, AND THE SENTENCE OF THE LAW THAT YOU, the above named defendant pay a

FINE I.$ 50.00 II.$ III.$ IV.$ V.$

COST I.$ 190.50 II.$ III.$ IV.$ V.$

Fine and Cost ☐ Reduced to Lien ☐ Within Months.

☐ Public Defender Fee of $ within ☐ Judgment Lien ☐ within

☑ CONT. FOR: ARRG ___/___/___ STAT ___/___/___ PRET ___/___/___ JTRL ___/___/___

VSTA ___/___/___ HEAR ___/___/___ PLEA ___/___/___ DISP ___/___/___

COPD 1/28/93 NTRL ___/___/___ STST ___/___/___ @ 8:45 AM

(Mo/Da/Yr)

It is the judgment of the court, and the sentence of the law that you, the above named defendant be confined in the

☐ Highlands County Jail ☐ State Prison ☐ Youthful Offender for a term of:

_____DYS/MOS/YRS TO RUN CONCUR/CONSEC WITH _____

_____DYS/MOS/YRS TO RUN CONCUR/CONSEC WITH _____

_____DYS/MOS/YRS TO RUN CONCUR/CONSEC WITH _____

_____DYS/MOS/YRS TO RUN CONCUR/CONSEC WITH _____

_____DYS/MOS/YRS TO RUN CONCUR/CONSEC WITH _____

☐ TO BE GIVEN CREDIT FOR _____ TIME SERVED.

☐ WEEKEND WORK RELEASE — REPORT TO JAIL IMMEDIATELY

☐ NOTIFY _____

11/09/92 BY J Lee D.C.

App. 21

IN THE COUNTY COURT OF THE
TENTH JUDICIAL CIRCUIT IN AND FOR
HIGHLANDS COUNTY, FLORIDA

MM92-1050A1-XX/GRABLE/dcl

STATE OF FLORIDA

VS.

SARA GILBREATH

DOB: 03-17-47
W/F
SSN: 266-88-6186

INFORMATION FOR

1. OBSCENE
TELEPHONE CALLS
F.S. 365.11 (M2)

IN THE NAME AND BY AUTHORITY OF
THE STATE OF FLORIDA

JERRY HILL, as State Attorney of and for the Tenth Judicial Circuit of the State of Florida, prosecuting for the State of Florida in the County of HIGHLANDS, under oath information makes that

SARA GILBREATH

on the 12th day of May, 1992, in the County and State aforesaid, did make a telephone call to a location at which the person receiving the call had a reasonable expectation of privacy, and during such call did make a comment, request suggestion, or proposal which was obscene, lewd, lascivious, filthy, vulgar or indecent and by such language intended to offend, annoy, abuse, threaten or harass a person at the called number, in violation of Section 365.16, Florida Statutes contrary to

the form of the Statute in such cases made and provided and against the peace and dignity of the State of Florida.

/s/ Linda Davis Grable
LINDA DAVIS GRABLE
As Assistant State Attorney
Florida Bar No: 930768

STATE OF FLORIDA

COUNTY OF HIGHLANDS

I, LINDA DAVIS GRABLE, as Assistant State Attorney of and for the Tenth Judicial Circuit of Florida, do hereby solemnly swear that the allegations set forth in the foregoing Information are based upon facts which have been sworn to as true and which, if true, would constitute the offense therein charged and that this prosecution is instituted in good faith.

/s/ Linda Davis Grable
LINDA DAVIS GRABLE
As Assistant State Attorney
Florida Bar No: 930768

Sworn to and subscribed to and before me this 10th day of November, A.D. 1992.

(PERSONALLY KNOWN) /s/ Lisa McIntyre
NOTARY PUBLIC

Official Notary Seal
LISA McINTYRE
Notary Public State of Florida
My Commission Exp.
September 1, 1994
Commission No. CC039159

* * *

[p. 6] or – it's up to you. I don't really care.

MR. STEINGOLD: I'll reserve opening statement.

THE COURT: Okay. You can call your first witness then.

MS. GRABLE: State calls Tod Silverwood.

THEREUPON:

TOD SILVERWOOD

was called as a witness on behalf of the Plaintiff and being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. GRABLE:

Q Mr. Silverwood, would you introduce yourself to His Honor, Judge Young.

A Your Honor, my name is Tod Silverwood.

THE COURT: Good morning.

A Good morning.

THE COURT: How do you do.

Q Tod, where do you live?

A I live –

Q You can sit down.

A Okay. I live at One, O – I just moved. I live at One, O, One Park Street, Sebring, close to the Parkshore Motel.

Q And how long have you been in Sebring?

A Off and on for about nine years.

Q What did you do when you weren't living in Sebring?

[p. 7] A I was in the military.

Q Okay. Do you know – Before we get into that. What's your relationship to Ron Hegadis?

A I'm his step-son.

Q Okay. And how long have you known Mr. Hegadis?

A For about eleven, twelve years.

Q And were you at Mr. Hegadis's house on May 12th?

A May –

Q May 12th of this year.

A I was there a lot during the first couple of weeks of May.

Q Okay. Could you give me –

A I didn't –

Q – some dates, a timeframe when you were going over to their house.

A From about, around the 1st to the illegible of May –

Q Okay.

A – I was going to their house.

Q And why did you go to their house?

A To eat mainly, because I was just getting on my feet. I was just starting a new job; I hadn't received my paycheck yet.

Q Okay. Did you go there for lunch?

A Yes, ma'am, I did.

Q On one of those occasions, between May illegible and the [p. 8] illegible, did you have occasion to answer the phone when you were having lunch?

A Yes, ma'am, I did.

Q And who was on the other end of the line?

A Sara Gilbreath.

Q And how do you know that?

A I've known Sara for, like I say, about nine years now, eight or nine years.

Q Have you talked to her on the phone before?

A Yes, I have.

Q Would you recognize her voice on the phone or in person?

A Yes, ma'am, I would.

Q Okay. Is there any doubt in your mind that on that particular day it was Sara Gilbreath who called?

A No, ma'am, there wasn't.

Q Okay. You say you know Ms. Gilbreath.

A Yes, ma'am.

Q Okay. Could you identify her?

A Yes, ma'am.

Q Is she here in the courtroom today?

A Yes, ma'am. She's sitting right by her attorney.

Q And what is it – Can you describe an article of her clothing.

A Yes, ma'am. She's wearing a floweredy shirt with a white shirt underneath it.

MR. STEINGOLD: Your Honor, we'll stipulate that the witness can identify the defendant.

THE COURT: Thank you.

Q What did Ms. Gilbreath say to you that day?

A I picked up the phone, and she asked if my mother was there; I told her no. And she asked where she was at; and my step-father said that she was in training. So then she asked to speak to my step-father; and I handed the phone over to him.

Q Okay. So, did you tell your step-father who it was?

A Yes, I did.

Q And is there any doubt in your mind that it was Sara Gilbreath?

A No, there isn't.

MS. GRABLE: Thank you. Pass the witness.

THE COURT: You may inquire.

CROSS EXAMINATION

BY MR. STEINGOLD:

Q Tod, you talked to me on occasion prior to today, right?

A Yes sir, I did.

Q In fact it was some time towards the end of October?

A Yeah. Yes, sir. I'd say the middle or ending of October.

Q Okay. So, it was a fact that you were home at the [p. 10] time Ms. Gilbreath made a call to them, to your parents' house?

A Yes, sir, I was.

Q Okay. You don't recall what day that was, correct?

A Not the date, sir.

Q Just some time in May maybe?

A The first couple weeks in May, because after the first couple weeks, around the illegible, I got my check where I was working; and then I did not go there any longer. I ate at work.

Q But you're not sure – There's no way you can put a specific date on when the call came in?

A No, sir. I just know it was somewhere between the 1st and the illegible. I can't tell you no specific date because I'm not sure myself of it –

Q And as well, you aren't sure of the time? In other words, it could have been three o'clock or it could have been at noon?

A No. I know it was around noontime because that was during my lunch break at work. I'd go there from twelve to one o'clock. Okay. So, I was there and I was cooking at the time; I was cooking macaroni and cheese. So, I know it was around, between those hours there. It wasn't late.

Q When the call came in, did Sara – Sara identified herself and said: Hey, this is Sara; how are you doing, Tod – correct?

A No. She said: Tod – When I answered the phone, she [p. 11] said: Tod, is your mother there.

Q Okay. Did she seem to be mad, angry, uptight?

A No, not with me.

Q Okay.

A I answered the phone, and she just asked me simple questions.

Q Okay. Did she curse at you or did she use curse words –

A No, sir.

Q – at the time?

A No, sir.

Q Okay. And did you finally tell her your mother wasn't there and that your father was there?

A Yes. I told her my mother wasn't there; and she asked if my father was there. So, I then passed the phone to him.

Q Okay. And prior to that you didn't hear – I mean she never cursed at you, she never –

A No, sir.

Q She didn't act like she was mad?

A No, sir.

Q Have you ever heard your step-father curse?

A I've heard him say like maybe Damn, things like that.

Q Okay. Do you have a good relationship with your step-father?

[p. 12] A I don't go over there a lot. I mean I have – I'm starting a family myself now. So it's kind of like I'm not over there a lot. And I was in the military a lot, so I haven't been around home a whole lot and stuff. I've lived here in Sebring and been with my parents, yeah. But, I mean I haven't lived here for a straight nine years. When I say nine years, I've been here off and on for nine years.

Q All right. During that off-and-on period for nine years and prior to the phone call coming through from

Ms. Gilbreath, were you friendly with Ms. Gilbreath's family?

A Yes, ma'am. Or, yes, sir. I'm sorry.

Q Okay.

A Yes, sir.

Q And isn't it a fact that your mother was kind of friendly with Sara? Correct?

A Yes, sir.

Q They used to talk all the time to the best of your knowledge?

MS. GRABLE: Your Honor, this is going way beyond the realm of my –

A Yes. I don't know if they talked every day.

MS. GRABLE: Excuse me.

THE COURT: What's the relevance of this?

MR. STEINGOLD: I can –

THE COURT: I mean I really don't – Whether they're [p. 13] buddies or not is irrelevant.

MR. STEINGOLD: I guess just to – I can call him as a rebuttal witness, or my own witness later on. I'll move on.

THE COURT: No. Go ahead. I –

MR. STEINGOLD: I was just – It was just going to come out later in testimony other than –

THE COURT: Well, ask him point-blank.

Q All right. Are your parents friendly with the Gilbreaths, or were they before May of 1992, to the best of your knowledge?

A To the best of my knowledge, yes. But I was away; see, I just got home from the military.

MR. STEINGOLD: All right. Thank you.

THE COURT: Okay Any redirect?

REDIRECT EXAMINATION

BY MS. GRABLE:

Q Did Miss Gilbreath specifically ask to speak to your father before you handed the phone to him?

A Yes, she did.

MS. GRABLE: That's all I have.

THE COURT: Thank you. You may step down.

Call your next witness.

MS. GRABLE: State calls Ron Hegadis.

State would not be opposed to him being allowed to go to work, Your Honor.

[p. 14] THE COURT: Okay. You're released.

THEREUPON:

RON HEGADIS

was called as a witness on behalf of the Plaintiff and being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. GRABLE:

Q Mr. Hegadis, would you introduce yourself to Judge Young please.

A My name is Ronald Andrew Hegadis.

THE COURT: How you doing.

A Fine, sir.

Q Mr. Hegadis, where do you work?

A Work at the post office at Sebring, Florida here.

Q How long have you worked there?

A A little over eight and a half years.

Q And what do you do?

A I'm a letter carrier and assistant supervisor.

Q What do your duties consist of as acting supervisor?

A Recording mail volume, and customer complaints and customer relations, and delegating which routes need help and supplying the help for them to make sure they get back within a reasonable time.

Q Do you also deal with the mail carriers – As an acting supervisor, do you deal with the mail carriers as far as [p. 15] their jobs and –

A Yes, I do.

Q Mr. Hegadis, do you know Sara Gilbreath?

A Yes, I do.

Q And is she here in the courtroom today?

A Yes.

Q Okay. And would you point her out and describe an article of her clothing.

A Yes. Sara Gilbreath there with the (indistinguishable) and a floweredy jacket on.

Q Thank you.

MS. GRABLE: If the record would so reflect, Your Honor.

THE COURT: So reflect.

Q All right. When did you meet Ms. Gilbreath?

A Right after I started with the Sebring post office, a little over eight and a half years ago.

Q And what was your relationship with the Gilbreaths?

A Just acquaintances.

Q Did you socialize with them?

A I never socialized with them, but I've been to their house.

Q Okay. Did you go out to dinner with them?

A Never went out to dinner with them, but I had dinner at their house.

[p. 16] Q Did you consider them friends?

A I consider everybody I work with friends.

Q Did you seek out their friendship? Did you ask them over to your house?

A No.

Q And how many times did you go out with them over the nine years that you knew them?

A I've been to their house I would say maximum probably seven times in the eight and a half years.

Q And has anything changed in your relationship recently?

A Yes, it has.

Q And what was that?

A There's no relationship at all now. I just feel relieved that I don't have to answer the telephone or talk with her any more.

Q Okay. Why is that?

A Because every time I answered the phone and talked to her it was all swearing, harassing words and threatening postal employees that was in management. Of course I'm in management myself.

Q Okay. So, Ms. Gilbreath has called you in the past?

A Yes.

Q On the phone at your home?

A Yes, she has.

[p. 17] Q Approximately how many times? Do you know?

A In the beginning she didn't really call and talk to me, to myself. Once I got into higher management, probably thirty or forty times.

Q And what time period was that of those thirty phone calls?

MR. STEINGOLD: I'm going to object, Your Honor, as being irrelevant as far as this particular phone call that they've alleged.

THE COURT: Overruled.

MS. GRABLE: Thank you.

Q What timeframe are you talking about these thirty calls?

A It was a period of two years.

Q Okay. What were the natures of the calls, phone calls?

A The calls were always the same – it was foul language, and wanting me to relay threats for her to postal employees. And just in general, it was just harassing, wanting me to relay threats for her to the postal management.

Q Were these threats aimed at you personally?

A I took it like it was to me because I was in management.

Q What in particular specifically bothered you about those phone calls?

[p. 18] A The language and the –

MR. STEINGOLD: I'd object, Your Honor.

MS. GRABLE: Your Honor, basically –

THE COURT: Counsel, on your feet when you make an objection.

MR. STEINGOLD: Objection as to prior calls and –

THE COURT: What's the objection?

MR. STEINGOLD: Irrelevancy. I mean we're talking about –

THE COURT: Overruled. This is non-jury.

MR. STEINGOLD: All right.

Q What in particular bothered you about those phone calls?

A The foul language and the threats she was making to postal employees and wanting me to relay threats for her.

Q Did you consider yourself part of management part of the postal community?

A Yes, ma'am. I was in management.

Q Was there a time when you asked Ms. Gilbreath not to call you

A Yes, I did.

Q And why did you ask her that?

A Because I didn't like the language and I wouldn't relay any threats for her. And they felt like – she was harassing me because I was in management.

[p. 19] Q Did you specifically tell her not to call you at home?

A Yes, I did.

Q And did you give her a reason why? Did you tell Ms. Gilbreath why you did not want her to call?

A I told her I didn't like the language and I didn't like the threats she was making.

Q After you told her that, did you accept a call from her?

A Yes.

Q And why did you do that?

A My step-son answered the phone, and she knew I was there because my step-son had asked me a question and I had answered him. And she asked if Ron was there, and my step-son said yes; and she wanted to talk to me. And I was there, so I went ahead and talked with her. I didn't want to be rude to her.

Q On what day was that? Do you remember at least around the date of that phone call?

A It was on May 12th.

Q And how do you know that?

A I made the report the following day about the harassing phone call; that was the 13th of May.

Q And what report was that?

A It was the one about all the foul language and she [p. 20] had called wanting me to relay threats for her.

Q Did that report go to the post office?

A Yes, ma'am.

Q Is there any doubt in your mind then that that call occurred on May 12th?

A There is no doubt whatsoever in my mind.

Q Now, you say you were home for lunch. How long is your lunch period?

A We get an hour and forty-five minutes for lunch. It starts at eleven thirty; and I don't go back to work until a quarter after one.

Q And do you know specifically what time that call came in?

A I would say it was approximately a quarter to twelve; I'd been home about ten minutes.

Q Okay. Specifically what did Ms. Gilbreath tell you on that particular call?

A When she started off, she wanted to know where my wife was working. And I told her she wasn't really working, she was in training at Ruth K. Davis. Then she commenced the swearing. She wanted to know – I guess she's not my – Do I have to say the foul language, the cuss words? If I have to, I'll say them.

THE COURT: Not really.

MS. GRABLE: We'll pass on that (indistinguisahable [sic]).

[p. 21] THE COURT: Is there any dispute that the words as used would be profanity?

MS. GRABLE: Well, I think –

MR. STEINGOLD: Well, there is a dispute – I think she is just charged with one phone call and that there was profanity on that one date, not continuous harassing phone calls.

THE COURT: Okay.

MR. STEINGOLD: But there is no dispute as far as if those words were to be used that they'd be profane.

THE COURT: Okay.

MR. STEINGOLD: There is dispute that those words were never used.

THE COURT: All right. Thank you. Then I don't need to hear them.

Q Did that call annoy you?

A Yes, it did.

Q Did the language offend you?

A It certainly did.

Q Was the language vulgar and filthy?

A Yes, it was.

Q The time that you told her not to call, did you expressly tell her that it was her language?

A I told her that I didn't like the language and I didn't like the threats she was making.

[p. 22] Q If she called you so many times before using language that offended you, why did you decide to file a report at this time and make this charge?

A The phone calls kept getting more and more frequent, and the language got fouler, and the threats got more and more violent; I said: It has to stop. And I decided that – I thought about it, and I just decided I didn't want the calls to come any more to our house. You couldn't answer the telephone; we had to let the answering machine get it. We had no privacy whatsoever, even with our own telephones.

Q Mr. Hegadis, do you swear?

A Occasionally.

Q What kind of words do you use?

A Well, basically just – Not words like that, I don't use. I use like Hell, Damn, Shit.

Q Was her language more foul and offensive than that?

A Of course it was.

MS. GRABLE: I pass the witness.

THE COURT: Okay. You may inquire.

CROSS EXAMINATION

BY MR. STEINGOLD:

Q Mr. Hegadis, do you recall taking a deposition on October 21st, 1992?

A Yes, sir.

Q And during that time of the deposition, do you recall [p. 23] making a statement that you must have made a mistake when you put the date down, that date being the 12th?

A I made that statement, yes, sir.

Q Okay. So you recall – and I'll show –

MR. STEINGOLD: May I approach the witness, Your Honor?

THE COURT: Uh huh.

Q What I have before me is exhibit "A", which is the affidavit that you signed. Do you recall me showing you this affidavit, which is defense exhibit "A" for identification purposes?

A Yes, sir.

Q Okay. And during the deposition when I showed you that affidavit which provides the date on which the offense took place, that being May 12th, do you recall telling me that there is a mistake on that affidavit that you signed under oath, that in fact it was not on the May 12th date that this incident took place?

A I thought I had made the statement earlier; because I hadn't read the affidavit. But once I saw my

own handwriting, I knew that was precisely it, because that's the day I wrote it.

Q Okay. But after I had shown you that affidavit during deposition and you observed that affidavit in your handwriting on that affidavit, isn't it a fact that you also stated then, after observing you [sic] handwriting on that affidavit, [p. 24] that the May 12th date was a mistake?

A If is said that, I – What I meant was the first part of May was the mistake. This is when I made the statement.

Q So now, today in this courtroom, you're stating that it did in fact happen on May 12th, that your testimony during the deposition is incorrect?

A Yes, sir. I made a mistake on the date there. This is the correct one. It all happened on the 12th, and I made the statement on the 13th, the very next day.

Q So, that is – You didn't put down the wrong date there?

THE COURT: What's the affidavit say?

A This would be on May 13th, 1992. This is correct.

MR. STEINGOLD: Okay. I'll offer the deposition then into evidence. I don't know if it has been filed.

THE COURT: You can read it, counselor. You can offer that (Indistinguishable).

Q Isn't it a fact that all these phone calls had been made to you because Ms. Gilbreath was looking to you as a friend and someone that worked in the post office with her husband and someone she could talk to?

A No. I don't believe that. I believe she wanted to use me for inside information; and she knew that it upset me.

Q Okay. She knew it would upset you?

A Of course, she did. She knows it upsets me, the [p. 25] language and the calls and things. I told her not to call. My wife had told her that the calls upset me.

Q When your step-son answered the phone, did he tell you that profanity was used?

A I believe he did, but he can't recall that it was.

Q Okay. But you recall it was used?

A Yes, sir.

Q Okay. And isn't it a fact you had been friendly with the Gilbreaths for some time? In other words, they –

A I work with her husband, I'm friends with everybody I work with and their family.

Q Okay. And up to the May date, this May 12th date, on which you said it happened, you all were friends, correct?

A Yes.

Q Okay.

A Acquaintances; I like to call it acquaintances.

Q Okay. Was she friendly with your wife?

A Yes; her and my wife talked on the phone.

MS. GRABLE: Your Honor, I believe this is getting into irrelevance here because it makes no difference whether she's friendly with the wife or –

THE COURT: (Indistinguishable.)

Q Would it have been unusual for Ms. Galbreath to call your house and ask for your wife?

A No.

[p. 26] Q Okay. So that phone call wasn't unusual?

A Not to my wife it wasn't.

Q Okay. And when Ms. Gilbreath called, did she intend to harass you, or did she intend to try and look to someone to get some support, to try and figure out what was going on with her husband at the post office?

A In my mind I believe she called to harass me when she found out I was home.

Q Okay. Do you recall in that deposition, page five, line twenty, in that deposition: She wasn't raising hell at you; she just basically wanted to talk to someone about and gripe to someone about what was going on with her husband? Answer: I guess you can say it like that.

A I remember saying that. But she knew the calls upset me.

Q Okay. So, she knew the calls upset you but she was calling to try and look to you for some help?

A I don't believe she was looking to me for help; she was looking to use me. She thought I could help her.

Q Once again, during the deposition, page six, line 13, your answer in response to the same question I just

asked, answer: I guess she just wanted to complain to me; she thought I could help her because I was on a higher level. Do you recall that answer?

A Yes. But I'm not in a higher level all the time.

[p. 27] Q Was Ms. Gilbreath ever swearing at you?

A Not personally, she never swore at me.

Q She was swearing at third parties?

A Yes.

Q Were these – So none of this swearing, none of this talking was – was, like, directed directly towards you; it was at third parties?

A Yes.

THE COURT: Who are the third parties?

A The postal management and some of the employees, sir.

THE COURT: Specific ones, or what?

Q Yes, sir.

THE COURT: Who?

Q The postmaster, Ed Wright (Phonetically), Mary Lou Woodard, the mailman.

THE COURT: And what were the nature or the threats?

Q She followed them; she was going to run them off the road. She wanted me to relay a threat to Mary Lou Woodard, which is a acting supervisor like I am, that if she lost her job for calling her at home her ass was gone.

THE COURT: If who lost her job?

Q If Sara had lost her job.

THE COURT: Where was her job?

A A real estate associate with the Coldwell Bankers.

Q So, it's your testimony these calls went on [p. 28] approximately two years, and which you were kind or trying to help, sir; you talked to her on the phone?

A The calls went on for about two years. And, like I said, they went on – they got more and more frequent, more violent, and more obscene.

Q And you take it as if she intended to harass you?

A She knew the calls I didn't like. And she knew I didn't like the language, and she knew I didn't like the threats.

Q Okay.

A So, why would she be calling me there?

Q And your testimony before this Court is that you never used profanity on the phone with her; it was she – she was the one that was using these profanity, this profanity?

A If I used any profanity it might have been Hell, or something like that. I got a ten-year old daughter at home; I don't swear like that in front of her.

Q Doesn't Ms. Gilbreath have kids at home too?

A Yes, sir, she does.

Q All right.

A They're both grown.

Q And not one of these phone calls was to cuss you out?

A Not me personally, no.

Q And, Ms. Gilbreath, what she was trying to do with these phone calls – you take it as if she was trying to bring you [p. 29] into a situation?

MS. GRABLE: Your Honor, I believe his last answer has already covered the material.

MR. STEINGOLD: This was not asked and answered.

THE COURT: Okay. Go ahead.

Q What, what – Do you feel that Ms. Gilbreath was trying to bring you into what was going on at the post office between her and her husband, her husband and the postal employees?

A I assume she was trying to use me, to see if I knew any information about what was going to happen to him. Because occasionally I am in a higher level situation.

Q And isn't it a fact that Ms. Gilbreath helped to rent your house out at one time?

A When we first came to Sebring, she got us a place to rent, yes, sir.

Q And wasn't she attempting to help your wife in getting a position?

MS. GRABLE: Your Honor, relevance.

THE COURT: We don't have a jury here; it's pointless, but let him run.

Q Isn't it a fact that Ms. Gilbreath had assisted your wife in trying to get a real estate license and trying to get established somewhere in real estate sales?

A I Know they had talked on the phone about the real [p. 30] estate stuff. But as far as going to work with Sara, my wife never mentioned that to me.

Q Okay. They talked often, or not that often?

A My wife to Sara? That I don't really know.

Q How long did you wait before you actually reported this to the police department?

A I never reported it to the police department. I reported it to the postal police. Not this here, the threat when her husband came back; if that is what you're talking about.

Q No. I'm talking about this, this the May 12th incident.

A Okay. Ten, twelve days, something like that.

Q And what prompted you to call the police about that?

A Well, I had to weigh it in my mind, whether I wanted to go through the trouble of having someone arrested or not, and have to go to court. But, I knew that the threats had to stop, and the harassing phone calls had to stop. Just had to think it over. I didn't want to jeopardize her, or get her in trouble.

Q Because you were friends with her?

A No. Because I didn't want to see anybody lose their job or lose a career. And that's the only way I could get the calls to stop, which it has.

Q Back to the deposition – back to the dates. Do you recall stating that it was the first week in May when this phone [p. 31] call took place?

A Yes, sir.

Q Okay. And you recall during the deposition that you just plain said, after reviewing that affidavit in your hand and after telling me that it was the first week, that you just plain don't even recall the date?

A Sir, I made the statement what I meant was the first of June, or the first of May was the mistake.

Q Okay. You don't recall stating that you don't recall the date, period?

A Really I don't.

Q Okay. Do you recall stating an answer here: I'm just going to have to tell you the truth; I'm not sure of the date of it; I'm not going to tell you a lie?

A I remember telling you I wasn't going to tell you a lie.

Q Do you remember saying: I just don't remember the date?

A The exact date, I didn't really remember it until I got the paper back with my own handwriting on it, and that's – I didn't go home and study for this. When I saw

the paper, I knew it was mine; and that was the exact date it was.

Q Okay. So this statement – you're testifying now that you didn't make this statement until prior to seeing that affidavit now in your hand.

[p. 32] A Didn't make it.

Q In other words, are you telling this Court that you didn't even review that affidavit with a date on it before making the statement that you just don't remember the date?

A Before I went to see you? No, I didn't go home to review the statement.

Q Okay. But do you recall during the deposition being shown –

THE COURT: Okay. Counsel, you've beaten the dead horse enough.

MR. STEINGOLD: Okay.

THE COURT: Anything further?

MR. STEINGOLD: No, Your Honor.

THE COURT: Any redirect?

MS. GRABLE: Your Honor, I realize that you made the statement that the witness did not have to say the words that Ms. Gilbreath said. However, because there is an indication that they plan to, to show that he swears as well as she does, I would like the opportunity to ask exactly what the words were.

THE COURT: Okay. If you don't mind.

A No, sir; I'll do it.

REDIRECT EXAMINATION

BY MS. GRABLE:

Q Okay. What exactly were the words that you found so offensive?

[p. 33] A Cocksucker, Motherfucker, Fucking Bitch, Whore, Pencil Dick Son of a Bitch.

MR. GRABLE: Thank you, that is sufficient.

Nothing further.

THE COURT: Okay. You may step down. And you are excused.

Do you have another witness?

MR. GRABLE: I think not, Your Honor. However, the state would reserve the right to put on rebuttal witnesses.

THE COURT: Okay.

MR. GRABLE: Thank you. The state –

THE COURT: Do you rest?

MR GRABLE: – rests.

MR. STEINGOLD: I move for a judgment of acquittal at this time, Your Honor. I don't believe that they've shown that – they've shown that there were repetitive calls; they've shown that perhaps in the light

most favorable to the state that this call was profane or profanity might have been used. But they didn't show that it was – there was intent by the caller to actually harass him. There was intent perhaps maybe to use the language; but the language that was used wasn't intended – There was no showing or intent by the caller to harass him. He says, perhaps in his mind he felt like he was being harassed. It's the mind of the defendant –

THE COURT: Motion denied.

* * *

[p. 72] And I submit that that happens quite often. But, in this particular case it happened on May 12th. At the deposition, Your Honor, Mr. Hegadis did state in the deposition he had not reviewed any of the reports. And he felt that the date was wrong, but he wasn't sure because he hadn't reviewed the reports. Once he reviewed the affidavit at the end of the deposition, he did indeed say it was the 12th.

Now, as to the testimony that the girls were there, Ruth Clark was there – that conversation took place anywhere from ten to fifteen minutes, Your Honor, during an hour and a half span.

Mr. Hegadis testified to the fact that the call came in on May 12th, probably around a quarter to twelve, twelve o'clock. The girls left by their – or by at least the last witness's own admission at quarter to twelve. The conversation lasted ten minutes between her and Ruth Clark. She still had an hour and forty-five minutes with which to call Ron Hegadis and make those obscene – make that obscene language.

THE COURT: I find her guilty as charged.

What is the state's recommendation.

MR GRABLE: The state's recommendation, Your Honor, is a withhold of adjudication, no-contact provisions for the Hegadises and counseling at Marge Brewster; treatment if needed.

THE COURT: Okay. What does the defense say?

MR. STEINGOLD: Your Honor, defense would say, you [p. 73] know, withhold is okay. If they want counseling and they want no contact, we got no problem with no conatact [sic]. Prior to today's date, my client has gotten some psychological evaluation. And I think it would probably be necessary to either share it with the probation officer – to show that they don't recommend any type of psychological treatment in that evaluation. But she has received an evaluation, after this incident, probably a month ago, thirty days prior to today's date or so. So, you know, that was done in preparation or what may happen down the line.

THE COURT: What do you say to that?

MR GRABLE: Well, Your Honor, basically –

THE COURT: Who is the evaluation from – by?

MR. STEINGOLD: What doctor was that?

THE DEFENDANT: Dr. Roy Mercer, a psychiatrist.

THE COURT: Do you have a copy of his report?

THE DEFENDANT: No, sir, not yet.

THE COURT: Let me leave it this way. I'll withhold adjudication; I will require her to have no contact whatsoever with either of the Hegadises or Hegadis, whatever the name is. If you furnish a copy of Dr. Mercer's report to the State and if it is acceptable to the State, I will not require counseling. It it is unsatisfactory, I will require counseling. Because, if this isn't nipped in the bud – I think there is a deeper problem than this minor criminal infraction; I think it's

* * *